

Agenda – Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

Lleoliad: I gael rhagor o wybodaeth cysylltwch a:
Ystafell Bwyllgora 1 – y Senedd **Gareth Williams**
Dyddiad: Dydd Llun, 5 Mawrth 2018 Clerc y Pwyllgor
Amser: 14.30 0300 200 6362
SeneddMCD@cynulliad.cymru

- 1 Cyflwyniad, ymddiheuriadau, dirprwyon a datganiadau o fuddiant

- 2 Offerynnau sy'n cynnwys materion i gyflwyno adroddiad arnynt i'r Cynulliad o dan Reol Sefydlog 21.2 neu 21.3

Offerynnau'r Weithdrefn Penderfyniad Negyddol

- 2.1 SL(5)192 – Gorchymyn Rheoleiddio Pwerau Ymchwilio (Gwylidwriaeth Gyfeiriedig a Ffynonellau Cuddwybodaeth Ddynol) (Diwygio) (Cymru) 2018
(Tudalennau 1 – 11)

CLA(5)–08–18 – Papur 1 – Rheoliadau

CLA(5)–08–18 – Papur 2 – Memorandwm Esboniadol

CLA(5)–08–18 – Papur 3 – Adroddiad

Offerynnau'r Weithdrefn Penderfyniad Cadarnhaol

- 2.2 SL(5)190 – Rheoliadau Awdurdod Cyllid Cymru (Pwerau i Ymchwilio i Droseddau) 2018
(Tudalennau 12 – 30)

CLA(5)–08–18 – Papur 4 – Rheoliadau

CLA(5)–08–18 – Papur 5 – Memorandwm Esboniadol

CLA(5)–08–18 – Papur 6 – Adroddiad



3 Papurau i'w nodi

3.1 Datganiad Ysgrifenedig gan Lywodraeth Cymru: adroddiad ar yr ymgynghoriad i Awdurdod Cyllid Cymru ("ACC") gael mynediad at bwerau troseddol

(Tudalennau 31 – 33)

CLA(5)–08–18 – Papur 7 – Adroddiad Llywodraeth Cymru ar yr ymgynghoriad i Awdurdod Cyllid Cymru ("ACC") gael mynediad at bwerau troseddol

4 Cynnig o dan Reol Sefydlog 17.42 i benderfynu gwahardd y cyhoedd o'r cyfarfod ar gyfer y busnes canlynol:

4.1 Bil Ombwdsmon Gwasanaethau Cyhoeddus (Cymru): Adroddiad drafft

(Tudalennau 34 – 72)

CLA(5)–08–18 – Papur 8 – Adroddiad Drafft

4.2 Bil Cyfraith sy'n Deillio o'r Undeb Ewropeaidd (Cymru)

(Tudalennau 73 – 83)

CLA(5)–08–18 – Papur 9 – briffio cyfreithiol

Dyddiad y cyfarfod nesaf

12 Mawrth 2018

OFFERYNNAU STATUDOL
CYMRU

2018 Rhif 197 (Cy. 46)

**PWERAU YMCHWILIO,
CYMRU**

Gorchymyn Rheoleiddio Pwerau
Ymchwilio (Gwyliadwriaeth
Gyfeiriedig a Ffynonellau
Cuddwybodaeth Ddynol)
(Diwygio) (Cymru) 2018

NODYN ESBONIADOL

(Nid yw'r nodyn hwn yn rhan o'r Gorchymyn)

Mae'r Gorchymyn hwn wedi ei wneud gan Weinidogion Cymru ac mae'n diwygio Gorchymyn Rheoleiddio Pwerau Ymchwilio (Gwyliadwriaeth Gyfeiriedig a Ffynonellau Cuddwybodaeth Ddynol) 2010 ("y Prif Orchymyn").

Mae erthygl 2 y Gorchymyn hwn yn diwygio'r Prif Orchymyn drwy fewnosod cofnod yn Rhan 1 o'r Atodlen i'r Prif Orchymyn mewn perthynas ag Awdurdod Cyllid Cymru ("ACC"). Mae hyn er mwyn rhagnodi gradd y bobl hynny o fewn ACC sy'n gallu awdurdodi gweithgarwch at ddibenion adrannau 28 a 29 o Ddeddf Rheoleiddio Pwerau Ymchwilio 2000.

Ystyriwyd Cod Ymarfer Gweinidogion Cymru ar gynnal Aseidiadau Effaith Rheoleiddiol mewn perthynas â'r Gorchymyn hwn. O ganlyniad, lluniwyd asesiad effaith rheoleiddiol o'r costau a'r manteision sy'n debygol o ddeillio o gydymffurfio â'r Gorchymyn hwn. Gellir cael copi oddi wrth: Llywodraeth Cymru, Parc Cathays, Caerdydd CF10 3NQ.

OFFERYNNAU STATUDOL
CYMRU

2018 Rhif 197 (Cy. 46)

**PWERAU YMCHWILIO,
CYMRU**

**Gorchymyn Rheoleiddio Pwerau
Ymchwilio (Gwyliadwriaeth
Gyfeiriedig a Ffynonellau
Cuddwybodaeth Ddynol)
(Diwygio) (Cymru) 2018**

Gwnaed 20 Chwefror 2018

*Gosodwyd gerbron Cynulliad Cenedlaethol
Cymru* 21 Chwefror 2018

Yn dod i rym 1 Ebrill 2018

Mae Gweinidogion Cymru yn gwneud y Gorchymyn a ganlyn drwy arfer y pwerau a roddir iddynt gan adran 30(1) a (6A) o Ddeddf Rheoleiddio Pwerau Ymchwilio 2000(1).

Enwi a chychwyn

1.—(1) Enw'r Gorchymyn hwn yw Gorchymyn Rheoleiddio Pwerau Ymchwilio (Gwyliadwriaeth Gyfeiriedig a Ffynonellau Cuddwybodaeth Ddynol) (Diwygio) (Cymru) 2018.

(2) Daw'r Gorchymyn hwn i rym ar 1 Ebrill 2018.

**Diwygio Gorchymyn Rheoleiddio Pwerau
Ymchwilio (Gwyliadwriaeth Gyfeiriedig a
Ffynonellau Cuddwybodaeth Ddynol) 2010**

2. Yn Rhan 1 o'r Atodlen i Orchymyn Rheoleiddio Pwerau Ymchwilio (Gwyliadwriaeth Gyfeiriedig a

(1) 2000 p. 23. Diwygiwyd adran 30 gan adran 187 o Ddeddf Casglu a Rheoli Trethi (Cymru) 2016 (decc 6). O ganlyniad i'r diwygiad hwn, mae'r pŵer yn is-adran 30(1) yn arferadwy gan Weinidogion Cymru at ddibenion rhagnodi personau sy'n arfer swyddogaethau Awdurdod Cyllid Cymru o unrhyw ddisgrifiad neu sy'n dal unrhyw swydd neu radd a ragnodir.

Ffynonellau Cuddwybodaeth Ddynol) 2010(1) (swyddi etc. a chyfyngiadau mewn cysylltiad ag awdurdodau cyhoeddus a bennir yn Rhan 1 o Atodlen 1 i'r Ddeddf), ar ôl y cofnod ar gyfer "The Welsh Assembly Government"(2) mewnosoder—

| | | | |
|------------------------------|-----------------------|---|--------------------------|
| "The Welsh Revenue Authority | Grade 7 or equivalent | — | Paragraphs (b) and (f)". |
|------------------------------|-----------------------|---|--------------------------|

Mark Drakeford

Ysgrifennydd y Cabinet dros Gyllid, un o Weinidogion Cymru
20 Chwefror 2018

-
- (1) O.S. 2010/521, y mae diwygiadau iddo ond nid oes yr un ohonynt yn berthnasol.
- (2) Addaswyd gan Ddeddf Cymru (p. 29), adran 4(4)(a) fel bod rhaid ei ddarllen "The Welsh Government".

Explanatory Memorandum to:

- 1. The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018**
- 2. The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018**

This Explanatory Memorandum has been prepared by the Welsh Revenue Authority Implementation Directorate and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Cabinet Secretary's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of:

1. The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018; and
2. The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018

I am satisfied that the benefits justify the likely costs.

Mark Drakeford AM
Cabinet Secretary for Finance

21 February 2018

1. Description

- 1.1 Part 9 of the Tax Collection and Management (Wales) Act 2016 (“TCMA”) amended the Police and Criminal Evidence Act 1984 (“the 1984 Act”), the Criminal Justice and Police Act 2001 (“the 2001 Act”) and the Proceeds of Crime Act 2002 (“the 2002 Act”) to allow the Welsh Ministers, by regulation and order, to confer powers on the Welsh Revenue Authority (“WRA”) to investigate devolved tax crime.

The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018.

- 1.2 These Regulations provide that the following provisions contained in the 1984 Act apply to WRA when it investigates devolved tax crime:
- a power to apply for and obtain a warrant from a justice of the peace to authorise entry and search of premises (section 8 of the 1984 Act);
 - a power to obtain access to “excluded material” or “special procedure material” (defined Part 2 of the 1984 Act), subject to obtaining a warrant from a judge in accordance with the procedure in Schedule 1 to the 1984 Act (section 9 of the 1984 Act);
 - a power to seize relevant items found during the course of a search (section 19);
 - the extension of seizure powers to require information contained in an electronic format to be produced during the course of a search (section 20);
 - a power which enables WRA to copy information which has been seized during the course of a search (section 21);
 - a power to retain anything seized during the course of a search (section 22).
- 1.3 In addition to these powers, the Regulations apply appropriate safeguards and governance on their potential use. These include safeguards in relation to execution of searches and the seizure of items found during the course of a search (sections 15 and 16), and accompanying rights for the owners of property seized during the course of a search (section 21). WRA will also be under a duty to notify in writing a person interviewed in relation to an offence when a decision is taken not to proceed (section 60B). More generally, WRA must comply with the statutory codes of practice issued under sections 66 and 67 of the 1984 Act when investigating criminal offences.
- 1.4 These Regulations will also apply provisions in Part 2 of the 2001 Act to investigations conducted by WRA, which, among other things, provide for additional powers of seizure during the course of a search. As with the 1984 Act, various safeguards are also applied to the use of those powers. For example, section 52 of the 2001 Act imposes a requirement on WRA when relying on the powers of seizure provided by sections 50 or 51 to provide the owner of the property with a written notice setting down various details, including what has been seized, the grounds of seizure and the scope to apply to a judge for the return of the seized

items. Section 59 of the 2001 Act gives any person with an interest in property seized using these powers the right to apply to the court for it to be returned, subject to certain conditions being met.

- 1.5 Regulation 3 provides that further to the provisions listed in the Schedule to the Regulations, any applicable safeguards, and procedural elements in the 1984 Act will also apply. Consequently, any terms defined by other provisions in the 1984 Act will also apply to WRA when the provisions listed in the Schedule are applied to WRA investigations.
- 1.6 Regulation 3(3) substitutes references to police officers, constables and the police with references to WRA.
- 1.7 Regulation 4 allows a person exercising a function conferred on WRA by the Regulations to use reasonable force if that person considers it necessary in the exercise of that function. This could range from guiding a person to stand aside by placing a hand on their arm through to stopping a person by restraining them to prevent violence or injury against another person or officer, for example.
- 1.8 Regulation 5 makes provision for WRA to search any person found on the premises which is the subject of a search in reliance of a warrant issued under the 1984 Act. However, WRA may only search a person where there is reasonable cause to believe the person is in possession of something which is likely to be of “substantial value” to the investigation. This may be concealing/hiding something which may be relevant to the investigation, whether by itself, such as a relevant document in a briefcase, or something which when considered alongside other material could be of value, such as a mobile phone with passwords for electronic files or a key in a persons pocket which would open a filing cabinet on the premises.
- 1.9 Regulation 6 modifies section 16 of the 1984 Act, which makes provision in relation to the authorisation required before multiple premises warrants can be executed on a second or subsequent occasion, and where an all premises warrant can be executed in respect of property not specified in the warrant. The modification made by regulation 6 has the effect of substituting the requirement of obtaining a police inspector’s approval with a requirement that approval may only be provided by a person exercising WRA functions of at least civil service Grade 7 (or equivalent).
- 1.10 Regulation 7 modifies section 77 of the 1984 Act, which makes provision in relation to the treatment of confessions made by a person with a learning disability. Where such a confession is received as evidence in criminal proceedings, section 77 of the 1984 Act requires the court to exercise caution before relying on that evidence where (among other things) it has not been made in the presence of an “independent person”. The modification made by regulation 7 ensures that a person

exercising a function conferred on WRA by these Regulations is not regarded as an “independent person”.

1.11 Regulation 8 specifies that the functions conferred by these Regulations may only be exercised by a person with written authorisation from WRA to conduct relevant investigations.

1.12 These Regulations will come into force on 1 April 2018.

The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018

1.13 The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018 (“the Order”) enables accredited financial investigators who are members of staff of the WRA to exercise the following powers under the 2002 Act:

- apply for a restraint order under Part 2;
- seize property to which a restraint order applies;
- search for, seize, detain and apply for the forfeiture of cash under Chapter 3, Part 5 (recovery of cash in summary proceedings); and
- apply for orders and warrants in relation to confiscation, money laundering and detained cash investigations under Part 8, including an application to the courts for an order requiring a financial institution to provide customer information in relation to a specified person.

1.14 The types of investigations referred to in relation to Part 8 can be described as follows:

- **Confiscation** – A confiscation investigation is an investigation into whether a person has benefited from his criminal conduct or to the extent or whereabouts of his benefit from his criminal conduct, following criminal prosecution.
- **Detained Cash** – A detained cash investigation is an investigation for the purposes of Chapter 3 of Part 5 of the 2002 Act into the derivation of cash detained under that chapter or a part of such cash, or whether cash detained under that chapter is intended by any person to be used in unlawful conduct.
- **Money laundering** – A Money laundering investigation is an investigation into whether a person has committed a money laundering offence. This could occur where for example, there is a reasonable suspicion that a person has converted criminal property.

1.15 In addition, the Order applies appropriate safeguards and governance on the potential use of these powers, including the requirement that certain powers can only be exercised after obtaining senior officer approval.

1.16 Article 3 of the Order provides that a reference to an accredited financial investigator in a provision of the 2002 Act specified in Part 1 of the Schedule to the Order, is a reference to an accredited financial investigator who is a member of staff of WRA.

1.17 Article 4 of the Order provides that a reference to an accredited financial investigator in a provision of the 2002 Act specified in Part 2 of the Schedule, is a reference to an accredited financial investigator who is a member of staff of WRA and is at or above grade 7 or equivalent.

1.18 This Order comes into force on 1 April 2018.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

2.1 This Explanatory Memorandum covers two Statutory Instruments; The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018, which is subject to the affirmative procedure and the Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial Investigators) Order 2018, which is subject to the negative procedure.

2.2 These Statutory Instruments are interlinked and it is beneficial to interpret the impacts of each Statutory Instrument jointly to explain the wider legislative context. Thus, an Explanatory Memorandum incorporating a Regulatory Impact Assessment has been prepared to describe both Statutory Instruments.

3. Legislative background

3.1 The Welsh Revenue Authority (Powers to Investigate Criminal Offences) Regulations 2018 are made under section 114ZA of the Police and Criminal Evidence Act 1984 and section 67A into the Criminal Justice and Police Act 2001.

3.2 Section 114ZA of the Police and Criminal Evidence Act 1984 was inserted by section 185(1) TCMA and section 67A of the Criminal Justice and Police Act 2001 was inserted by section 185(2) TCMA.

3.3 In accordance with section 114ZA(4) of the 1984 Act and section 67A(4) of the 2001 Act, the regulations must be laid before and approved by the National Assembly for Wales (the affirmative procedure).

3.4 The Proceeds of Crime Act 2002 (References to Welsh Revenue Authority Financial investigators) Order 2018 is made pursuant to section 453(1A) and (2) of the Proceeds of Crime Act 2002. This Order is subject to the negative resolution procedure.

3.5 Section 453(1A) of the Proceeds of Crime Act 2002 was inserted by section 186 TCMA.

4. Purpose & intended effect of the legislation

- 4.1 The Tax Collection and Management (Wales) Act 2016 creates three criminal offences: wrongful disclosure of protected taxpayer information under section 20; concealing or destroying documents following an information notice under section 114 and concealing or destroying documents following notification under section 115. In addition to these offences there are a number of other criminal offences relevant to devolved taxes, including fraud (under the Fraud Act 2006); the common law offence of cheating the public revenue; and facilitating tax evasion (under the Criminal Finances Act 2017).
- 4.2 WRA's functions include promoting compliance with the law relating to devolved taxes (section 12 TCMA). This means that WRA has a role to play in tackling criminal behaviour that impacts on the devolved taxes. The purpose of the Regulations and the Order are to confer relevant investigatory powers on WRA so that it can lawfully and effectively tackle criminal behaviour, exercising powers as a law enforcement agency, by acquiring evidence to enable the prosecution of criminal offences.
- 4.3 Criminal behaviour in this context can be wide ranging, covering both devolved taxes, and could include deliberately providing false information to WRA (e.g. lying in a tax return); deliberately failing to comply with the requirements of the law (e.g. not weighing waste before it is sent to landfill or misstating the value of a land transaction); or deliberately destroying documents or other information that may be needed to establish a person's true tax position. The criminal intent in each of these circumstances is to make a financial gain or to seek to reduce the amount of money that should be paid to the public revenue.
- 4.4 These criminal investigation powers are additional to the civil investigatory powers conferred on WRA under the devolved tax legislation (Tax Collection and Management (Wales) Act 2016, Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 and Land Disposals Tax (Wales) Act 2017), which are primarily intended to allow WRA to identify and collect the correct amount of tax due (by obtaining information and inspecting premises, and where appropriate, imposing financial penalties). In some cases, it may be appropriate for individuals to face criminal sanctions for their behaviour, including fines and custodial sentences and these powers facilitate that.
- 4.5 It may also be considered appropriate to recover the money and assets a person acquires as a result of that criminal behaviour. The 2002 Act enables an accredited financial investigator to look into the financial position of individuals under investigation to identify, trace and freeze the proceeds of crime with a view to asking the courts to make a confiscation order following prosecution.

- 4.6 The Regulations and Order seek to put WRA in a similar position to HMRC in terms of criminal investigation powers, although the powers conferred on WRA by these statutory instruments are narrower than those conferred on HMRC. This reflects the narrower scope of the functions which WRA is able to exercise, for example WRA has no customs functions. WRA will not, for example, have the power to arrest or detain a person, or the powers to stop and search a person or vehicles without a warrant from a justice of the peace.
- 4.7 There is a real possibility of criminal offences in relation to Welsh devolved taxes in the future. The OECD report on Fighting Tax Crime recognises that “criminal law plays an important role... it enhances the general preventive effect that criminal law enforcement can have and reduces non compliance.”¹ Enabling the WRA to investigate devolved tax offences, as HMRC does for LfT and SDLT, with a consistent set of criminal investigation powers will help to ensure Wales is not seen as a soft target for those who may be seeking to evade taxes. Public knowledge that there are the appropriate criminal powers in place will allow WRA to prioritise criminal enforcement in appropriate cases and, therefore, act as a deterrent for those contemplating breaking the law. However, as previously noted, the civil powers conferred on WRA will be used in the majority of compliance cases.
- 4.8 The Regulations and Order are intended to provide WRA with proportionate criminal investigation powers to tackle and deter devolved tax crime. In exercising the powers conferred by these statutory instruments, WRA will be subject to the supervision of the courts and will be required to comply with all relevant safeguards in the same way as the exercise of these powers by other law enforcement agencies such as the police and HMRC. In particular, a person will only be authorised by WRA to exercise these powers where that person has the requisite experience, training and understanding of the relevant legal framework and it is anticipated that these staff will carry specific identification similar to a warrant card. In addition, use of the powers will need to comply with PACE codes of practice and, where specified, be approved at an appropriate level within WRA by a senior, authorised officer with the requisite experience, training, accreditation and understanding of the relevant legal framework.
- 4.9 In relation to the POCA order, accredited financial investigators must be trained, accredited and monitored by the National Crime Agency and the use of these investigatory powers must be by order or warrant from the court. Evidence and information obtained through the use of these powers must be retained and stored in a safe and secure way and used only for the purpose for which it was obtained, as is the case for all protected taxpayer information.

¹ Fighting Tax Crime: The Ten Global Principles OECD 2017, p.14 - <http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.pdf>

PART 2 – REGULATORY IMPACT ASSESSMENT

1. Options

Option 1: Do Nothing

1.1 Under this option, the Regulations and Order would not be introduced.

Option 2: Introduce the regulations

1.2 Under this option, the Regulations and Order as described in Part 1 of this Explanatory Memorandum would be introduced. This is the preferred option.

2. Costs & benefits

Option 1: Do Nothing

2.1 If these Regulations and Order were not introduced, the WRA would be unable to use the investigative powers in the 1984 Act, the 2001 Act and the 2002 Act to investigate criminality and reclaim the proceeds of that crime for the public purse in relation to the devolved Welsh taxes. In this option, powers to investigate criminality in the devolved Welsh taxes would fall to the police forces in Wales.

2.2 It would be possible for the police in Wales to lead on all elements of investigation of devolved tax offences. However, this would be an additional responsibility for police in Wales and any police action would be dependent on their consideration of a range of other priorities. The Home Office are responsible for policing across England and Wales, (though the Welsh Government partially funds the police and, along with Welsh local authorities, have a strong and close relationship with the Welsh police).

Option 2: Introduce the Regulations and Order

2.3 The Welsh Government's preferred option is that the WRA investigate tax crime themselves. Financial profit is the driver for almost all serious and organised crime, and other lower-level acquisitive crime. It is difficult to estimate the cost of tax crime in relation to the two devolved taxes, however, HMRC estimate that there is a 10% tax gap for landfill tax and a 1% tax gap for stamp duty land tax². This suggests that the potential lost revenue to the WRA for LDT could be in the region of £2.6 million and for LTT in the region of £2.5 million – although only part of this

² Measuring the Tax Gap 2017, HMRC The tax gap is the difference between the amount of tax that should, in theory, be collected by HMRC, and what is actually collected.

would be due to tax crime.³As tax rules diverge across the UK following the devolution of tax powers to Wales and Scotland, it is imperative that tax crime is tackled consistently and in the best interests of compliant taxpayers and businesses, so no part of the UK is a safe haven for those who evade tax. It will be important that any organisation responsible for investigating devolved tax offences works closely with HMRC and Revenue Scotland to share information and ensure effective enforcement.

- 2.4 It is clear that the application of the 1984 Act, the 2001 Act and the 2002 Act will have resource implications for WRA and the Welsh Government and there is a shared commitment to ensuring that appropriate resources are made available.
- 2.5 Much of the governance and compliance work required to enable the lawful exercise of these powers will be case-specific – the powers under consideration are permissive: WRA would not be required to use them, but would have the option to do so in appropriate circumstances.
- 2.6 This means that the immediate impact of the Regulations and the Order could be relatively limited, for example, to allow staff to receive appropriate training and accreditation. It is anticipated that the initial resource requirements stemming from WRA access to criminal powers can be accommodated within the existing WRA budget allocation of £6m for 2018/19 and 2019/20.
- 2.7 The exercise of the powers in particular cases could imply further cost, for example, relating to the storage of evidence and the appropriate equipment for staff. The ongoing resource will depend on the extent and nature of the case-work that WRA may wish to take forward and the priority attached to it. The costs associated will be dependant upon the nature, volume and extent of criminality uncovered once WRA becomes operational and has access to protected taxpayer information.
- 2.8 However, it may be anticipated that some of those costs may overlap with WRA's civil enforcement powers under TCMA, to inspect premises and to take samples and remove documents during an inspection.
- 2.9 The Office of Budget Responsibility considers the cost and benefits associated with compliance work subject to “high levels of uncertainty since they target specific subsets of taxpayers who are already actively changing their behaviour to lower their tax liabilities. As a result, there is usually relatively high behavioural uncertainty. Similarly, since the measures are directed at uncollected tax, there is usually less reliable data available to inform the costing.”⁴

³ Based on information from HMRC Measuring the Tax Gap 2017 and Welsh Government tax forecasts

⁴ Office of Budget Responsibility – “Working Paper No.11: Evaluation of HMRC anti-avoidance and operational measures, September 2017” http://budgetresponsibility.org.uk/docs/dlm_uploads/WP-No.11-Evaluation-of-HMRC-anti-avoidance-and-operational-measures.pdf

- 2.10 However, the benefit of investment in tackling tax crime are seen as not only recovering lost tax, but also in encouraging wider compliance as the risk of being caught outweighs the potential benefit. In addition, OECD states that “the investment is worthwhile, with some jurisdictions being able to calculate the return on investment from the criminal tax investigation teams and reporting recovery of funds well in excess of the expenditure, ranging from 150% to 1500% return on investment.”⁵
- 2.11 The Regulations and Order are not expected to impose costs on business, other than those that may become subject to an investigation from potential criminal activity.
- 2.12 The Regulations and Order are considered as a way of levelling the playing field for legitimate businesses in Wales. The Regulations and Order are designed to tackle tax crime and we anticipate this to be most prevalent in landfill disposals tax, which will have the potential to impact on wider waste crime which can have serious environmental impacts. However, the motive for tax crime is economic and is aimed at the acquisition of financial benefit. As with any crime, waste crime has a cost to the wider economy, taking business away from legitimate, permitted waste operators, who therefore lose income and the ability to invest in their businesses and the wider local economy. However, the profits come largely at the expense of the taxpayer. The Environmental Services Association estimates “each pound spent on enforcement is likely to yield a return of as much as £5.60. Of this £3.20 would be received directly by government in taxes, with the rest benefitting legitimate waste sector businesses and wider society.”⁶
- 2.13 Overall, the benefits of this option are:
- By creating an effective deterrent to criminal behaviour, it has the potential to reduce tax lost as a result of criminal activity;
 - There is the potential to reclaim revenue lost to the public purses as a result of criminal behaviour;
 - It has the potential to create a fairer environment for waste businesses and other tax payers in Wales; and
 - Consultation responses from other law enforcement agencies, including the police, National Crime Agency and NRW were supportive of the proposals.

3. Consultation

- 3.1 On 10 July, the Welsh Government published a consultation on WRA access to criminal powers to tackle tax crime, which closed on 2 October. In total, the Welsh Government received 17 responses from a

⁵ Fighting Tax Crime – The Ten Global Principles: OECD 2017-
<http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.pdf>

⁶ Environmental Services Association Education Trust- Waste Crime: Tackling Britain’s Dirty Secret:
http://www.esauk.org/esa_reports/ESAET_Waste_Crime_Tackling_Britains_Dirty_Secret_LIVE.pdf

range of stakeholders from various sectors, all from within Wales.

3.2 A full Welsh Government response to the consultation can be viewed here: <https://consultations.gov.wales/consultations/welsh-revenue-authority-powers-tackle-tax-crime>

3.3 Following the consultation, engagement has taken place with the Home Office, HMRC, CPS, NRW, National Crime Agency and the Police as well as other WRA stakeholders. Their views have been taken into account when developing these Regulations and Order.

4. Post implementation review

4.1 The Finance Committee in its Stage 1 Report on the TCMA stated: “the Minister should consider reviewing these powers once the taxes have been established and in operation for a number of years.”⁷

4.2 It is anticipated that TCMA will be reviewed within three to five years. The Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Act 2017 will be reviewed by May 2023 and the Landfill Disposals Tax (Wales) Act 2017 will follow the same timeline. The impact of the powers conferred by the Regulations and Order will be considered as part of the wider review programme.

⁷National Assembly for Wales, Finance Committee, Tax Collection and Management (Wales) Bill Stage 1 Committee Report, November 2015. Paragraph 241.
<http://www.assembly.wales/laid%20documents/cr-ld10451/cr-ld10451-e.pdf>

SL(5)192 - Gorchymyn Rheoleiddio Pwerau Ymchwilio (Gwyliaidwriaeth Gyfeiriedig a Ffynonellau Cuddwybodaeth Ddynol) (Cymru) 2018

Cefndir a Phwrpas

Mae'r Gorchymyn hwn yn diwygio Gorchymyn Rheoleiddio Pwerau Ymchwilio (Gwyliaidwriaeth Gyfeiriedig a Ffynonellau Cuddwybodaeth Ddynol) 2010 (OS 2010/521) ('Gorchymyn 2010') drwy fewnosod cofnod i Ran 1 o'r Atodlen i'r Prif Orchymyn mewn perthynas ag Awdurdod Refeniw Cymru ('WRA'). Pwrpas y gwelliant hwn yw rhagnodi graddfa'r bobl hynny o fewn WRA (ar raddfa 7 y gwasanaethau sifil neu gyfwerth) a all awdurdodi gweithgaredd at ddibenion adrannau 28 a 29 (ar gyfer defnyddio gwyliaidwriaeth gyfeiriedig a ffynonellau cudd-wybodaeth ddynol) o Ddeddf Rheoleiddio Pwerau Ymchwilio 2000.

Y weithdrefn

Negyddol

Craffu Technegol

Ni nodwyd unrhyw bwyntiau i gyflwyno adroddiad arnynt o dan Reol Sefydlog 21.2 mewn perthynas â'r offeryn hwn.

Craffu ar rinweddau

Mae'r Gorchymyn hwn yn gwneud diwygiad technegol i Orchymyn 2010 a fydd yn galluogi person priodol gymwys ar raddfa gwasanaethau sifil gradd 7 neu gyfwerth i roi awdurdodaeth ar gyfer defnyddio gwyliaidwriaeth gyfeiriedig a ffynonellau cuddwybodaeth ddynol mewn perthynas â phwerau ehangach WRA ar gyfer ymchwilio i droseddau. Mae'r Memorandwm Esboniadol yn nodi rhesymeg y polisi nad yw'n ymddangos yn afresymol. Serch hynny, tynnir sylw at y Rheoliadau ar y sail eu bod o bwys cyfreithiol neu wleidyddol neu'n peri materion polisi cyhoeddus sy'n debygol o fod o ddiddordeb i'r Cynulliad. [Rheol Sefydlog 21.3(ii)]

Goblygiadau sy'n deillio o adael yr Undeb Ewropeaidd

Dim.

Ymateb y Llywodraeth

Nid oes angen ymateb gan y llywodraeth.

Cynghorwyr Cyfreithiol

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

26 Chwefror 2018



Eitem 2.2

Rheoliadau drafft a osodwyd gerbron Cynulliad Cenedlaethol Cymru o dan adran 114ZA(4) o Ddeddf yr Heddlu a Thystiolaeth Droseddol 1984 ac adran 67A(4) o Ddeddf Cyfiawnder Troseddol a'r Heddlu 2001, i'w cymeradwyo drwy benderfyniad gan Gynulliad Cenedlaethol Cymru.

OFFERYNNAU STATUDOL CYMRU DRAFFT

2018 Rhif (Cy.)

TRETHI, CYMRU

**Rheoliadau Awdurdod Cyllid
Cymru (Pwerau i Ymchwilio i
Droseddau) 2018**

NODYN ESBONIADOL

(Nid yw'r nodyn hwn yn rhan o'r Rheoliadau)

Mae'r Rheoliadau hyn yn darparu bod darpariaethau amrywiol yn Neddf yr Heddlu a Thystiolaeth Droseddol 1984 ("Deddf 1984") a Deddf Cyfiawnder Troseddol a'r Heddlu 2001 ("Deddf 2001") i'w cymhwyso i ymchwiliadau i droseddau a gynhelir gan Awdurdod Cyllid Cymru ("ACC").

Mae rheoliad 3(1) yn cyflwyno'r Atodlen i'r Rheoliadau hyn, sy'n pennu'r darpariaethau yn Neddf 1984 sydd i'w cymhwyso i ymchwiliadau a gynhelir gan ACC, yn ddarostyngedig i addasiadau penodol. Y darpariaethau cymwys yn Neddf 1984 a gynhwysir yn yr Atodlen yw—

- (a) pŵer i wneud cais am warant a chael gwarant gan ynad heddwch i awdurdodi mynediad i fangre a'i chwilio (adran 8 o Ddeddf 1984);
- (b) pŵer i gael mynediad i ddeunydd eithriedig neu ddeunydd gweithdrefn arbennig (fel y diffinnir "excluded material" a "special procedure material" yn Rhan 2 o Ddeddf 1984), yn ddarostyngedig i gael gwarant gan farnwr yn unol â'r weithdrefn yn Atodlen 1 i Ddeddf 1984 (adran 9 o Ddeddf 1984);
- (c) rhagofalon amrywiol mewn perthynas â chais am warant a gweithredu chwiliadau (adrannau 15 ac 16 o Ddeddf 1984);

- (d) pŵer i ymafael mewn eitemau perthnasol y deuir o hyd iddynt yn ystod chwiliad (adran 19 o Ddeddf 1984);
- (e) estyn y pwerau ymafael i'w gwneud yn ofynnol i wybodaeth a gynhwysir ar ffurf electronig gael ei chyflwyno yn ystod chwiliad (adran 20 o Ddeddf 1984);
- (f) pŵer sy'n galluogi ACC i gopïo gwybodaeth yr ymafaelwyd ynddi yn ystod chwiliad, a hawliau cysylltiedig i berchnogion eiddo yr ymafaelir ynddo yn ystod chwiliad (adran 21 o Ddeddf 1984);
- (g) pŵer i gadw unrhyw beth yr ymafaelir ynddo yn ystod chwiliad (adran 22 o Ddeddf 1984);
- (h) gofyniad i ACC hysbysu person a gyfwelwyd mewn perthynas â throsedd yn ysgrifenedig pan benderfynir dod â'r ymchwiliad i ben (adran 60B o Ddeddf 1984); ac
- (i) gofyniad i ACC rhoi sylw i'r codau ymarferer a ddyroddir o dan adran 66 o Ddeddf 1984 pan fo'n cynnal ymchwiliad perthnasol.

Mae rheoliad 3(2) yn darparu bod y darpariaethau a gynhwysir yn Rhan 2 o Ddeddf 2001 (sydd, ymysg pethau eraill, yn darparu ar gyfer pwerau ymafael ychwanegol) hefyd yn gymwys pan fo ACC yn cynnal ymchwiliad perthnasol.

Mae rheoliad 3(3) yn gwneud darpariaeth gyffredinol mewn perthynas â chymhwyso darpariaethau Deddf 1984 a Deddf 2001. Effaith y paragraff hwn yw darparu yn gyffredinol ar gyfer rhoi "WRA" yn lle "constable", "police officer" a "the police" wrth gymhwyso darpariaethau Deddf 1984 a Deddf 2001.

Mae rheoliad 3(4) yn darparu y bydd darpariaethau Deddf 1984 nad ydynt yn cael eu pennu yn yr Atodlen yn gymwys i'r graddau y maent yn ymwneud â'r darpariaethau a bennir yn yr Atodlen. Er enghraifft, mae'r diffiniad o "excluded material" yn adran 11 o Ddeddf 1984 i fod yn gymwys er mwyn diffinio "excluded material" mewn perthynas â chwiliad a gynhelir gan ACC drwy ddibynnu ar warant a ddyroddir o dan baragraff 12 o Atodlen 1 i Ddeddf 1984.

Mae rheoliad 4 yn darparu y caiff person sy'n arfer swyddogaeth a roddir i ACC gan y Rheoliadau hyn ddefnyddio grym rhesymol, os yw hynny'n angenrheidiol, wrth arfer y swyddogaeth honno.

Mae rheoliad 5 yn darparu y caiff ACC chwilio person a ganfyddir mewn mangre sy'n destun chwiliad gan ACC, drwy ddibynnu ar warant a ddyroddir o dan adran 8 o Ddeddf 1984, neu baragraff 12 o Atodlen 1 iddi, ar yr amod bod gan ACC achos rhesymol i gredu

bod y person yn meddu ar ddeunydd sy'n debygol o fod o werth sylweddol i'r ymchwiliad.

Mae rheoliad 6 yn addasu adran 16(3A) a (3B) o Ddeddf 1984 i'r graddau na chaiff person fynd i fangre na chwilio mangre nad yw wedi ei phennu mewn gwarant pob mangre, na mynd i fangre na chwilio mangre ar ail achlysur nac ar achlysur dilynol, onid yw'r person hwnnw wedi ei awdurdodi yn ysgrifenedig gan berson sydd ar Radd 7 yn y gwasanaeth sifil (neu radd gyfatebol) o leiaf.

Mae rheoliad 7 yn addasu adran 77(3) o Ddeddf 1984, sy'n gwneud darpariaeth mewn perthynas ag ymdrin â chyfaddefiadau gan berson sydd ag anabledd dysgu. Mae'r addasiad a wneir gan rheoliad 7 yn sicrhau na chaiff "independent person" fod yn berson sy'n arfer swyddogaeth a roddir i ACC gan y Rheoliadau hyn.

Mae rheoliad 8 yn darparu na chaiff y swyddogaethau a roddir i ACC gan y Rheoliadau hyn ond cael eu harfer gan berson sydd wedi ei awdurdodi yn ysgrifenedig gan ACC i gynnal ymchwiliadau perthnasol.

Ystyriwyd Cod Ymarfer Gweinidogion Cymru ar gynnal Asesiadau Effaith Rheoleiddiol mewn perthynas â'r Rheoliadau hyn. O ganlyniad, lluniwyd Asesiad Effaith Rheoleiddiol o'r costau a'r manteision sy'n debygol o ddeillio o gydymffurfio â'r Rheoliadau hyn. Gellir cael copi oddi wrth: Llywodraeth Cymru, Parc Cathays, Caerdydd CF10 3NQ.

Rheoliadau drafft a osodwyd gerbron Cynulliad Cenedlaethol Cymru o dan adran 114ZA(4) o Ddeddf yr Heddlu a Thystiolaeth Droseddol 1984 ac adran 67A(4) o Ddeddf Cyfiawnder Troseddol a'r Heddlu 2001, i'w cymeradwyo drwy benderfyniad gan Gynulliad Cenedlaethol Cymru.

OFFERYNNAU STATUDOL
CYMRU DRAFFT

2018 Rhif (Cy.)

TRETHI, CYMRU

**Rheoliadau Awdurdod Cyllid
Cymru (Pwerau i Ymchwilio i
Droseddau) 2018**

Gwnaed

Yn dod i rym

1 Ebrill 2018

Mae Gweinidogion Cymru yn gwneud y Rheoliadau a ganlyn drwy arfer y pwerau a roddir iddynt gan adran 114ZA(1) a (2) o Ddeddf yr Heddlu a Thystiolaeth Droseddol 1984(1) ac adran 67A(1) a (2) o Ddeddf Cyfiawnder Troseddol a'r Heddlu 2001(2).

Yn unol ag adran 114ZA(4) o Ddeddf yr Heddlu a Thystiolaeth Droseddol 1984 ac adran 67A(4) o Ddeddf Cyfiawnder Troseddol a'r Heddlu 2001, gosodwyd drafft o'r Rheoliadau hyn gerbron Cynulliad Cenedlaethol Cymru ac fe'i cymeradwywyd ganddo drwy benderfyniad.

Enwi a chychwyn

1.—(1) Enw'r Rheoliadau hyn yw Rheoliadau Awdurdod Cyllid Cymru (Pwerau i Ymchwilio i Droseddau) 2018.

(2) Daw'r Rheoliadau hyn i rym ar 1 Ebrill 2018.

-
- (1) 1984 p. 60. Mewnosodwyd adran 114ZA gan adran 185(1) o Ddeddf Casglu a Rheoli Trethi (Cymru) 2016 (dccc 6).
(2) 2001 p. 16. Mewnosodwyd adran 67A gan adran 185(2) o Ddeddf Casglu a Rheoli Trethi (Cymru) 2016.

Dehongli

2. Yn y Rheoliadau hyn—

ystyr “ACC” (“WRA”) yw Awdurdod Cyllid Cymru;

ystyr “Deddf 1984” (“*the 1984 Act*”) yw Deddf yr Heddlu a Thystiolaeth Droseddol 1984;

ystyr “Deddf 2001” (“*the 2001 Act*”) yw Deddf Cyfiawnder Troseddol a’r Heddlu 2001;

ystyr “ymchwiliad perthnasol” (“*relevant investigation*”) yw ymchwiliad troseddol sy’n ymwneud â mater y mae gan ACC swyddogaethau mewn perthynas ag ef.

Cymhwyso Deddf 1984 a Deddf 2001

3.—(1) Yn ddarostyngedig i baragraff (3) a rheoliadau 4 i 8, mae darpariaethau Deddf 1984 a gynhwysir yn yr Atodlen i’r Rheoliadau hyn (“y swyddogaethau PACE cymwys”) yn gymwys i ymchwiliadau perthnasol a gynhelir gan ACC.

(2) Yn ddarostyngedig i baragraff (3) a rheoliadau 4 i 8, pan fo ACC yn arfer unrhyw un neu ragor o’r swyddogaethau PACE cymwys, mae’r darpariaethau a gynhwysir yn Rhan 2 o Ddeddf 2001 yn gymwys i ymchwiliadau perthnasol a gynhelir gan ACC.

(3) Yn ddarostyngedig i reoliad 6, mae darpariaethau Deddf 1984 a Deddf 2001 a gymhwysir gan y Rheoliadau hyn yn cael effaith fel pe bai cyfeiriadau at “WRA” yn cael eu rhoi yn lle cyfeiriadau at “constable”, “police officer” a “the police” (sut bynnag y’u mynegir), ac mae’r darpariaethau hynny i’w dehongli yn unol â hynny.

(4) Mae darpariaethau eraill Deddf 1984, i’r graddau y maent yn ymwneud â’r swyddogaethau PACE cymwys, yn gymwys i ymchwiliadau perthnasol a gynhelir gan ACC.

Defnyddio grym rhesymol

4. Caiff person sy’n arfer swyddogaeth a roddir i ACC gan y Rheoliadau hyn ddefnyddio grym rhesymol, os yw hynny’n angenrheidiol, wrth arfer y swyddogaeth honno.

Chwilio personau

5. Caiff ACC chwilio person—

- (a) pan ganfyddir y person mewn mangre sy’n cael ei chwilio gan ACC drwy ddibynnu ar warant a ddyroddwyd o dan adran 8 o Ddeddf 1984, neu baragraff 12 o Atodlen 1 iddi; a
- (b) pan fo gan ACC achos rhesymol i gredu bod y person hwnnw yn meddu ar ddeunydd sy’n

debygol o fod o werth sylweddol (pa un ai ar ei ben ei hun neu ynghyd â deunydd arall) i ymchwiliad perthnasol.

Addasu adran 16 o Ddeddf 1984 (gweithredu gwarantau)

6. Mae adran 16 o Ddeddf 1984(1) (gweithredu gwarantau) wedi ei haddasu fel a ganlyn—

(a) yn lle is-adran (3A) rhodder—

“(3A) If the warrant is an all premises warrant, no premises which are not specified in it may be entered or searched by a person exercising WRA functions unless that person has been authorised in writing by another person exercising WRA functions of at least Grade 7 (or equivalent).”;

(b) yn lle is-adran (3B) rhodder—

“(3B) No premises may be entered or searched by a person exercising WRA functions for the second or any subsequent time under a warrant which authorises multiple entries unless that person has been authorised in writing by another person exercising WRA functions of at least Grade 7 (or equivalent).”

Addasu adran 77(3) o Ddeddf 1984 (diffiniad o “independent person”)

7. Mae adran 77(3) o Ddeddf 1984(2) (diffiniad o “independent person”) wedi ei haddasu i'r graddau bod y diffiniad o “independent person” yn cynnwys person sy'n arfer swyddogaeth a roddir i ACC gan y Rheoliadau hyn.

Awdurdodiad

8. Nid yw'r swyddogaethau a roddir i ACC gan y Rheoliadau hyn ond yn arferadwy gan bersonau sydd ag awdurdodiad ysgrifenedig gan ACC i gynnal ymchwiliadau perthnasol.

Ysgrifennydd y Cabinet dros Gyllid, un o Weinidogion Cymru
Dyddiad

(1) Mewnosodwyd adran 16(3A) a (3B) gan adrannau 113(9)(a) a 114(8)(b) o Ddeddf Troseddau Cyfundrefnol Difrifol a'r Heddlu 2005 (p. 15).

(2) Diwygiwyd adran 77 gan baragraff 48 o Ran 4 o Atodlen 36 i Ddeddf Cyfiawnder Troseddol 2003 (p. 44). Mae diwygiad arall i'r adran hon ond nid yw'n berthnasol i'r Rheoliadau hyn.

Y darpariaethau cymwys yn Neddf 1984

- (a) adran 8 (pŵer ynad heddwch i awdurdodi mynediad i fangre a'i chwilio)(1);
- (b) adran 9 (darpariaethau arbennig ynglŷn â mynediad)(2) ac Atodlen 1 (gweithdrefn arbennig)(3);
- (c) adran 15 (gwarantau chwilio – rhagofalon)(4);
- (d) adran 16 (gweithredu gwarantau) yn ddarostyngedig i'r addasiadau yn rheoliad 6;
- (e) adran 19 (pŵer cyffredinol i ymafael etc.)(5);
- (f) adran 20 (estyn pwerau i ymafael i wybodaeth gyfrifiadurol)(6);
- (g) adran 21 (mynediad a chopïo)(7);
- (h) adran 22(1) i (4) a (7) (cadw)(8);
- (i) adran 60B (hysbysu am benderfyniad i beidio ag erlyn person a gyfwelwyd)(9);
- (j) adran 66 (codau ymarfer)(10);
- (k) adran 67 (codau ymarfer – atodol)(11);
- (l) adran 77 (ymdrin â chyfaddefiadau gan bersonau sydd ag anabledd dysgu) yn ddarostyngedig i'r addasiad yn rheoliad 7.

-
- (1) Diwygiwyd adran 8 gan adrannau 113(3), (4) a 114(2) o Ddeddf Troseddu Cyfundrefnol Difrifol a'r Heddlu 2005, a pharagraff 43(3) o Ran 3 o Atodlen 7 iddi, ac adran 86 o Ddeddf Cyllid 2007 (p. 11). Mae diwygiadau eraill ond nid yw'r un ohonynt yn berthnasol i'r Rheoliadau hyn.
 - (2) Diwygiwyd adran 9 gan Ddeddf Llysoedd 2003 (p. 39). Mae diwygiad arall i'r adran hon ond nid yw'n berthnasol i'r Rheoliadau hyn.
 - (3) Diwygiwyd Atodlen 1 gan baragraff 14 o Ran 2 o Atodlen 2 i Ddeddf 2001; paragraff 6 o Atodlen 4 i Ddeddf Llysoedd 2003; adran 113(10) i (14) o Ddeddf Troseddu Cyfundrefnol Difrifol a'r Heddlu 2005 a pharagraff 43(13) o Ran 3 o Atodlen 7 iddi; ac adran 82(3) o Ddeddf Dadreoleiddio 2015 (p. 20). Mae diwygiad arall i'r adran hon ond nid yw'n berthnasol i'r Rheoliadau hyn.
 - (4) Diwygiwyd adran 15 gan adran 113(6) i (8) a 114(4) i (7) o Ddeddf Troseddu Cyfundrefnol Difrifol a'r Heddlu 2005, a pharagraff 1 o Ran 2 o Atodlen 17 iddi, ac erthygl 7 o Orchymyn Deddf Troseddu Cyfundrefnol Difrifol a'r Heddlu 2005 (Diwygio) 2005 (O.S. 2005/3496).
 - (5) Diwygiwyd adran 19 gan baragraff 13(1) a (2)(a) o Ran 2 o Atodlen 2 i Ddeddf 2001.
 - (6) Diwygiwyd adran 20 gan baragraff 13(1) a (2)(a) o Ran 2 o Atodlen 2 i Ddeddf 2001.
 - (7) Diwygiwyd adran 21 gan baragraffau 1 a 3 o Atodlen 1 i Ddeddf Cyfiawnder Troseddol 2003.
 - (8) Mewnosodwyd adran 22(7) gan baragraffau 1 a 4 o Atodlen 1 i Ddeddf Cyfiawnder Troseddol 2003.
 - (9) Mewnosodwyd adran 60B gan adran 77 o Ddeddf Plismona a Throsedd 2017 (p. 3).
 - (10) Diwygiwyd adran 66 gan adran 57(4) o Ddeddf Cyfiawnder Troseddol a Gwasanaethau Llys 2000 (p. 43). Mae diwygiadau eraill ond nid yw'r un ohonynt yn berthnasol i'r Rheoliadau hyn.
 - (11) Diwygiwyd adran 67 gan Ran 1 o Atodlen 37 i Ddeddf Cyfiawnder Troseddol 2003. Mae diwygiadau eraill ond nid yw'r un ohonynt yn berthnasol i'r Rheoliadau hyn.

**Explanatory Memorandum to the Regulation of Investigatory Powers
(Directed Surveillance and Covert Human Intelligence Sources)
(Amendment) (Wales) Order 2018**

This Explanatory Memorandum has been prepared by the Welsh Revenue Authority Implementation Directorate and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Cabinet Secretary/Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) (Wales) Order 2018.

I am satisfied that the benefits justify the likely costs.

Mark Drakeford AM
Cabinet Secretary for Finance and Local Government

21 February 2018

1. Description

- 1.1 The Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) (Amendment) (Wales) Order 2018 (“the Order”) amends the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (“the Principal Order”) by inserting an entry into Part 1 of the Schedule to the Principal Order in relation to the Welsh Revenue Authority (“WRA”).
- 1.2 This Order will come into force on 1 April 2018.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

- 2.1 None.

3. Legislative background

- 3.1 The Order is made pursuant to section 30(1) and (6A) of the Regulation of Investigatory Powers Act 2000 (“RIPA”). Section 187 of the Tax Collection and Management (Wales) Act 2016 (“TCMA”) amended section 30 RIPA to enable the Welsh Ministers to make an order designating persons exercising WRA functions as persons able to grant authorisations for the use of directed surveillance and covert human intelligences sources for the purposes of sections 28 and 29 RIPA.
- 3.2 This Order is subject to the negative resolution procedure.

4. Purpose & intended effect of the legislation

- 4.1 The policy rationale in relation to these powers is that WRA should have proportionate investigation powers to tackle and deter criminality and devolved tax avoidance and evasion. HMRC are able to authorise the use of directed surveillance and covert human intelligence sources in Wales to tackle and deter avoidance and evasion. It is the policy intention that WRA should be in substantially the same position in this regard.
- 4.2 This amendment will enable an appropriately qualified person at civil service grade 7 or equivalent within WRA to grant authorisation for the use of directed surveillance and covert human intelligence sources.
- 4.3 Directed surveillance means, broadly, surveillance which is covert but not intrusive – for example, does not involve gaining access to a private dwelling or vehicle – and is undertaken for the purposes of a specific investigation or a specific operation, in such a manner as is likely to result in the obtaining of private information about a person. Surveillance is covert if, and only if, it is carried out in a manner that is calculated to

ensure that persons who are subject to the surveillance are unaware that it is or may be taking place.

- 4.4 A covert human intelligence source (CHIS) means a person who establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing the following: using the relationship to obtain information or to provide access to any information to another person; disclosing information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship, to another person.
- 4.5 Authorisation may not be granted by that person unless that individual believes it is necessary for (a) the purpose of preventing or detecting crime or preventing disorder, or (b) the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department.
- 4.6 Directed surveillance and the use of covert human intelligence sources under RIPA are important not just in a criminal law context (to investigate offences), but also in a civil law context (e.g. to identify the amount of tax that a person should pay). This means that, should the power to make these authorisations be conferred, the WRA would be able to use surveillance and covert human intelligence source powers for the purpose of assessing or collecting devolved tax.
- 4.7 The fundamental purpose of the RIPA framework is to protect the rights of individuals from unlawful intrusion into their personal or business affairs by law enforcement agencies; to ensure those agencies (and individuals within them) act lawfully; and so to ensure that any evidence gathered through these activities is used fairly and appropriately as part of lawful proceedings.
- 4.8 The framework provides that CHIS can only be used when authorised by an appropriately senior officer and, in some cases, by a judge. Those officers must be professionally trained and must undergo continuous professional development in line with RIPA requirements and comply with RIPA codes of practice. Before authorising CHIS, for example, an officer would need to consider whether the information can be obtained by other means; the safety of the individuals involved; and whether the action is proportionate, necessary and reasonable.
- 4.9 Any public authority authorised under RIPA is subject to independent oversight and scrutiny by the Investigatory Powers Commissioner's Office (IPCO) (which took over the responsibility for oversight of investigatory powers from the Office of Surveillance Commissioners (OSC) in September 2017). The IPCO will scrutinise the WRA's processes and procedures in the use of investigatory powers, including directed surveillance and CHIS. IPCO considers the use of CHIS as immensely sensitive and as a result the use of these powers is very closely examined and inspected. Even where the WRA does not make

any CHIS authorisations, the WRA's records, processes and procedures will be scrutinised and reported on.

PART 2 – REGULATORY IMPACT ASSESSMENT

1. Options

Option 1: Do Nothing

1.1 Under this option, the Order would not be introduced.

Option 2: Introduce the regulations

1.2 Under this option, the Order as described in Part 1 of this Explanatory Memorandum would be introduced. This is the preferred option.

2. Costs & benefits

Option 1: Do Nothing

- 2.1 If the Order were not introduced, the WRA would not be required to follow the framework procedures provided by RIPA when seeking to use covert surveillance or covert human intelligence sources (CHIS) to investigate tax evasion and tax avoidance, including under the new unauthorised disposals regime introduced by Part 4 of the Landfill Disposals Tax (Wales) Act 2017 (“LDTA”). Failure to follow the procedures in RIPA does not necessarily render action unlawful. The application of the RIPA framework is designed to ensure that WRA acts in a lawful way.
- 2.2 Without the application of the RIPA framework and the scope to authorise surveillance and use of covert human intelligence sources, the ability of the WRA to collect and manage devolved taxes could be hampered.
- 2.3 This could be particularly relevant in relation to Part 4 of LDTA, taxable disposals at places other than authorised landfill sites, where WRA will need to carefully manage information that may be provided by individuals.

Option 2: Introduce the Order

- 2.4 The Order would allow WRA to authorise the use of surveillance and covert human intelligence sources in a lawful way, ensuring that any activities authorised by the WRA are proportionate, reasonable and a fair use of those investigatory techniques.
- 2.5 The use of the RIPA framework provides a structured and lawful means for evaluating the need for the use of such intrusive techniques, and is a safeguard to protect the rights of citizens and the reputation and integrity of WRA. RIPA requires a senior authorising officer to be accountable for the decision making process and before that authorisation may be given the authorising officer must be satisfied that:

- the information can not be obtained by other means;
 - balance and minimise the risks to individuals involved;
 - the WRA will be able to maintain the safety of all involved;
 - the action is proportionate, necessary and reasonable.
- 2.6 The application of the Order would require training, accreditation and continued professional development for authorising officers in order to provide the necessary authorisation framework under RIPA.
- 2.7 It is anticipated that the initial resource requirements stemming from RIPA can be accommodated within the existing WRA budget allocation of £6m for 2018/19 and 2019/20.
- 2.8 The exercise of RIPA surveillance and CHIS in particular cases could imply further cost, for example, relating to the surveillance equipment, ensuring the safety of individuals and availability of officers to support this activity out of hours for example. The ongoing resource will depend on the extent and nature of the case-work that WRA may wish to take forward and the priority attached to it. The costs associated will be dependant upon the nature, volume and extent of criminality uncovered and the appetite to pursue unauthorised disposals once WRA becomes operational and has access to protected tax payer information.
- 2.9 Information in relation to the cost of RIPA activity is not available although, the Investigatory Powers Commissioner's Office indicates that the use of these types of covert surveillance activities across the UK and Scotland are limited and are reducing year on year. In 2016/17 1,887 instances of directed covert surveillance were authorised by public authorities in the UK and Scotland, with the Department of Work and Pensions accounting for more than 64% of those authorisations. In relation to CHIS, 2,310 authorisations were made by public authorities in 2016/17 and these were usually used for trading standards type matters. Only 6.6% of public authorities authorised to use CHIS deployed the use of CHIS in 2016/17.¹
- 2.10 The Order is not expected to impose costs on business, other than those that may become subject to an investigation from potential criminal or civil investigatory activity and the Order is not expected to have an adverse impact on competition in Wales.
- 2.11 Overall, the benefits of this option are:
- to ensure that the relevant investigatory powers are used in accordance with human rights;
 - to protect the rights of individuals from undue, unfair and unlawful intrusion into their personal life by law enforcement agencies;

¹Office of Surveillance Commissioners Annual Report, p.14 - <https://www.ipco.org.uk/docs/OSC%20Annual%20Report%202016%20-%202017%20with%20new%20page%20furniture.pdf>

- to apply independent scrutiny by the Investigatory Powers Commissioner's Office to the functions of the WRA;
- to place requirements on the WRA to train, develop and continuously review and maintain standards for all staff and senior officers;
- to provide a framework of authorisation for any use of covert surveillance or CHIS activity, including in some circumstances the authorisation of a judge; and
- consultation responses from other law enforcement agencies, including HMRC, the police and National Crime Agency were supportive of this option.

3. Consultation

- 3.1 On 10 July, the Welsh Government published a consultation on WRA access to criminal powers to tackle tax crime, which closed on 2 October. In total, the Welsh Government received 17 responses from a range of stakeholders from various sectors, all from within Wales.
- 3.2 A full Welsh Government response to the consultation can be viewed here: <https://consultations.gov.wales/consultations/welsh-revenue-authority-powers-tackle-tax-crime>
- 3.3 Following the consultation, engagement has taken place with the Home Office, HMRC, CPS, NRW, National Crime Agency and the Police as well as other WRA stakeholders. Their views have been taken into account when developing this Order.

SL(5)190 - Rheoliadau Awdurdod Cyllid Cymru (Pwerau i Ymchwilio i Droseddau) 2018

Cefndir a Phwrpas

Mae'r Rheoliadau hyn yn darparu bod darpariaethau amrywiol yn Neddf yr Heddlu a Thystiolaeth Droseddol 1984 a Deddf Cyfiawnder Troseddol a'r Heddlu 2001 i'w cymhwyso i ymchwiliadau i droseddau a gynhelir gan Awdurdod Cyllid Cymru ("ACC"). Maent yn cynnwys cael mynediad i fangre o dan amgylchiadau penodedig ac i ymfael mewn eitemau perthnasol.

Ceir esboniad o'r darpariaethau unigol yn y Nodyn Esboniadol a'r Memorandwm Esboniadol. Gwnaeth yr Ysgrifennydd Cabinet ddatganiad ysgrifenedig cysylltiedig ar 21 Chwefror 2018 yn cyfeirio at yr amgynghoriad ynghylch y pwerau a'r penderfyniadau a gymerwyd.

Gweithdrefn

Gadarnhaol

Craffu Technegol

Ni nodwyd unrhyw bwyntiau i gyflwyno adroddiad arnynt o dan Reol Sefydlog 21.2 mewn perthynas â'r offeryn hwn.

Craffu ar rinweddau

Nodwyd y pwynt canlynol i gyflwyno adroddiad arno o dan Reol Sefydlog 21.3 mewn perthynas â'r offeryn hwn.

Rhoddir pwerau sylweddol i ACC gan y Rheoliadau hyn. Rhoddwyd esboniad nad yw'n ymddangos yn afresymol o'r pwerau hynny. Er hynny, tynnir sylw at y Rheoliadau ar y sail eu bod o bwysigrwydd gwleidyddol neu gyfreithiol neu eu bod yn codi materion polisi cyhoeddus sy'n debyg o fod o ddiddordeb i'r Cynulliad. [Rheol Sefydlog 21.3(ii)]

Y goblygiadau yn sgil gadael yr Undeb Ewropeaidd

Ni nodwyd unrhyw bwyntiau i gyflwyno adroddiad arnynt o dan Reol Sefydlog 21.3 mewn perthynas â'r offeryn hwn yn y cyd-destun hwnnw.

Ymateb y Llywodraeth

Nid oes angen ymateb gan y Llywodraeth.

Cynghorwyr Cyfreithiol

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

Chwefror 2018



DATGANIAD YSGRIFENEDIG GAN LYWODRAETH CYMRU

TEITL Adroddiad Llywodraeth Cymru ar yr ymgynghoriad i Awdurdod Cyllid Cymru (“ACC”) gael mynediad at bwerau troseddol

DYDDIAD 21 Chwefror 2018

GAN Mark Drakeford, Ysgrifennydd y Cabinet dros Gyllid

Ar 10 Gorffennaf lansiwyd ymgynghoriad yn ceisio barn am gynigion Llywodraeth Cymru i ACC gael mynediad at bwerau troseddol. Amlinellodd yr ymgynghoriad, a ddaeth i ben ar 2 Hydref, fy nghynnig y dylai ACC gael pwerau yn eu lle i atal ac ymchwilio i droseddu ym maes trethi datganoledig. Daeth 17 o ymatebion i law, gan gynnwys cyfraniadau gan bartneriaid allweddol fel yr Asiantaeth Troseddol Cenedlaethol a Chyfoeth Naturiol Cymru. At ei gilydd, roedd cefnogaeth i safbwynt Llywodraeth Cymru ar y prif faterion a nodwyd yn yr ymgynghoriad.

Ni ddylai unrhyw Lywodraeth ddeddfu i roi pwerau troseddol i awdurdod cyhoeddus oni bai bod angen hynny. Roedd yr ymgynghoriad yn cynnig y dylai ACC gael mynediad at rai o'r pwerau sy'n cael eu harfer ar hyn o bryd gan CThEM wrth ymchwilio i droseddu ym maes trethi yng Nghymru. Ynghlwm wrth y pwerau sefydledig hyn mae set ddiffiniedig o fesurau diogelwch i sicrhau bod y pwerau hyn yn cael eu defnyddio yn gymesur ac yn briodol. Wedi ystyried yr ymatebion a ddaeth i law, rwyf wedi casglu y dylai ACC gael mynediad at rai o'r pwerau sydd ar gael ar hyn o bryd i CThEM o dan Ddeddf yr Heddlu a Thystiolaeth Droseddol 1984 a Deddf Cyfiawnder Troseddol a'r Heddlu 2001. Yn arbennig, dylai ACC allu gwneud cais i ynad heddwch am warant i gael mynediad i fangre, chwilio ac atafaelu eitemau o fangre neu chwilio person a geir ar y fangre honno wrth ymchwilio i droseddu ym maes trethi datganoledig.

Roedd gwahaniaeth barn ymhlith ymatebwyr ynghylch peidio â rhoi pwerau arestio a chadwad fel rhan o ymchwiliad troseddol, a mynegwyd pryder y gallai diffyg y pwerau hyn atal ACC rhag cyfweld pobl dan amheuaeth. O gofio'r safbwyntiau hyn a'r nifer bach o droseddau trethi y disgwylir ymchwilio iddynt bob blwyddyn, nid wyf yn credu ei bod yn gymesur ar hyn o bryd i ACC gael mynediad i'r pwerau hyn. Er hynny, mae'n bwysig nodi na fydd diffyg y pwerau hyn yn atal ACC rhag cyfweld pobl o dan amheuaeth, ac y bydd angen i ACC gydymffurfio â'r Cod Ymarfer perthnasol a rhwymedigaethau cyfreithiol ehangach wrth gynnal cyfweliad o'r fath.

Ar sail yr ymatebion hyn, rwyf wedi cyflwyno drafft o Reoliadau Awdurdod Cyllid Cymru (Pwerau i Ymchwilio i Droseddau) 2018 wedi'i gyflwyno gerbron y Cynulliad i'w gymeradwyo yn ystod y Cyfarfod Llawn ar 20 Mawrth 2018.

Gofynnodd ein hymgyngoriad safbwyntiau hefyd ar allu ACC i arfer pwerau o dan Ddeddf Enillion Troseddau 2002 ("POCA"). Roedd yr ymatebwyr hefyd o blaid y dull gweithredu a awgrymwyd sef galluogi ACC i benodi ymchwilydd ariannol achrededig i arfer pwerau POCA i:

- i. wneud cais am orchymyn atal ac arfer pwerau chwilio ac atafaelu cysylltiedig;
- ii. adfer arian parod trwy achosion sifil diannod ac arfer pwerau chwilio ac atafaelu cysylltiedig; a
- iii. gwneud amryw o geisiadau (er enghraifft, gwneud cais am orchymyn monitro cyfrif) o ran rhan 8 o POCA yn ystod ymchwiliad atafaelu, gwyngalchu arian neu arian cadwedig.

Er na chynigiwyd hyn i gychwyn yn yr ymgynghoriad, mae nifer o ymatebwyr i'r ymgynghoriad, yn enwedig yr Asiantaeth Troseddu Cenedlaethol (NCA), wedi argymhell y dylai ACC gael troi at bwerau penodol i ymchwilio i wyngalchu arian. Bydd y pwerau hyn yn caniatáu i ymchwilydd ariannol achrededig olrhain asedau troseddol lle mae gan ACC le rhesymol dros gredu bod troseddau ym maes trethi datganoledig a gwyngalchu arian wedi digwydd.

Ar sail yr ymatebion hyn, heddiw mae Gorchymyn Deddf Enillion Troseddau 2002 (Cyfeiriadau at Ymchwilydd Ariannol Awdurdod Cyllid Cymru) 2018 wedi'i gyflwyno, a fydd yn rhoi mynediad i ACC - trwy ymchwilydd ariannol achrededig - at nifer o bwerau yn Neddf Enillion Troseddau 2002.

Yn olaf, roedd yr ymatebwyr i'r ymgynghoriad hefyd yn cefnogi'r cynnig y dylai ACC allu awdurdodi gwyliadwriaeth gyfeiriedig yn unol â' Deddf Rheoleiddio Pwerau Ymchwilio 2000 ("RIPA"). Ceisiodd yr ymgynghoriad safbwyntiau hefyd ynghylch a ddylai ACC allu awdurdodi'r defnydd o ffynonellau cudd-wybodaeth ddynol ("CHIS") o dan RIPA. Roedd yr ymatebion a ddaeth i law yn cefnogi hyn ac mae trafodaeth ddilynol â rhanddeiliaid allweddol i gyd wedi tanlinellu pwysigrwydd pŵer awdurdodi CHIS o dan RIPA.

Diben fframwaith RIPA yw amddiffyn hawliau unigolion rhag ymyrraeth anghyfreithlon â'u materion personol neu fusnes gan asiantaethau gorfodi'r gyfraith ac rwyf yn credu ei bod yn bwysig bod ACC yn rhan o'r fframwaith hwnnw. Mae hyn yn golygu na ellir defnyddio CHIS ond pan fydd wedi'i awdurdodi gan uwch swyddog sydd wedi'i hyfforddi'n briodol. Ymhellach, mae unrhyw awdurdod cyhoeddus a awdurdodir o dan Ddeddf Rheoleiddio Pwerau Ymchwilio 2000 yn destun goruchwyllo a chraffu gan Swyddfa'r Comisiynydd Pwerau Ymchwilio (IPOC).

O safbwynt defnyddio CHIS gan ACC, mae'n bosibl y gallai math o berthynas debyg i CHIS godi, nid oherwydd bod ACC wedi ceisio hynny neu gymhell unigolyn i fod yn CHIS, ond yn hytrach am fod ACC yn ymateb i wybodaeth na ofynnwyd amdani oddi wrth unigolion o dan rai amgylchiadau. Heb y gallu Tawdlerdyd CHIS o dan RIPA, byddai gallu gorfodi ACC yn

cael ei lesteirio, am na allai staff ACC ofyn yn gyfreithlon am wybodaeth bellach mewn sefyllfa o'r fath.

Mae ACC wedi cadarnhau y byddent yn bwriadu awdurdodi'r defnydd o CHIS yn y ffordd ymatebol hon, fel ffordd o ymateb i ddeunydd cyfathrebu gan unigolion, yn hytrach nag mewn ffordd ragweithiol neu ymwthiol. Mae ACC yn bwriadu paratoi polisi gweithredol ar sut y byddai'n gweithredu cyn hir, gan dynnu ar gyngor IPOC ac asiantaethau eraill gorfodi'r gyfraith.

Mae Gorchymyn Rheoleiddio Pwerau Ymchwilio (Gwyliadwriaeth Gyfeiriedig a Ffynonellau Cuddwybodaeth Ddynol) (Diwygio) (Cymru) 2018, a osodwyd gerbron y Cynulliad heddiw, felly'n cadw cysondeb â CThEM ac yn darparu y bydd ACC yn gallu awdurdodi a CHIS o ran RIPA.

Caiff y datganiad ei gyhoeddi yn ystod y toriad er mwyn rhoi'r wybodaeth ddiweddaraf i aelodau. Os bydd aelodau eisiau i mi wneud datganiad pellach neu ateb cwestiynau ynglŷn â hyn pan fydd y Cynulliad yn dychwelyd, byddwn yn hapus i wneud hynny.

Eitem 4.1

Yn rhinwedd paragraff(au) vi o Reol Sefydlog 17.42

Mae cyfyngiadau ar y ddogfen hon

Mae cyfyngiadau ar y ddogfen hon